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April 21, 2004

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Chk # 2686

Amount 25.00

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Date 4-22-04

REPLY TO

P O Box 549

KNOXVILLE, TENNESSEE 37901

E-MAIL TO mj@jendrekpc.com

Ms. Charla Dillon, Docket Clerk
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Via Fax 615/741-5015
and FedEx

Re: Motion for Leave to File Reply; Docket No. 03-00329

Dear Ms. Dillon:

Enclosed is an original and 14 copies of a Motion for Leave to File Reply, filed by East Sevier County Utility District in the above-referenced case. Please return the extra copy to me in the self-addressed, postage paid envelope once it is file-stamped

Because I am uncertain if a filing fee is required for this Motion, also enclosed is my firm's check in the amount of \$25.00. If the filing fee is not required, please return the check to me with the file copy of the pleading.

By copy of this letter and the enclosure, the Motion is being served on counsel to On-Site Systems, Inc.

This relates to a matter on the Conference Agenda for Monday, April 26, 2004.

Thank you very much for your help. If you have any questions, please call.

Very truly yours,



Mark Jendrek

Enclosures

cc: Donald L. Scholes
East Sevier County Utility District

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: PETITION OF ON-SITE SYSTEMS, INC.)
TO AMEND ITS CERTIFICATE OF) Docket No. 03-00329
CONVENIENCE AND NECESSITY)

MOTION FOR LEAVE TO FILE REPLY

Comes now East Sevier County Utility District ("District"), by and through counsel, and pursuant to Rule 1220-1-2-.06(3) of the Tennessee Rules & Regulations, requests leave to file a reply to the Objection of On-Site Systems, Inc. ("On-Site") to the District's Petition for Reconsideration, Intervention, and/or for a Declaratory Order ("Petition for Reconsideration"). In support of this Motion, the District states as follows:

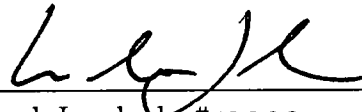
While technically, Rule 1220-1-2-.06(3) applies to Preliminary Motions and therefore may not apply, it is prudent to request leave for the District to file a reply, a copy of which is attached hereto as Exhibit A.

The District respectfully requests the Tennessee Regulatory Authority ("Authority") grant this Motion and complete the pleadings in this matter. The issues raised in On-Site's response are new, have not been addressed in the District's initial Petition for Reconsideration, and the Authority deserves a full and complete

analysis of those issues prior to making a decision on the Petition for Reconsideration. Because issues raised by On-Site are procedural matters which do not address the merits of the District's Petition for Reconsideration, and because the issues raised in the District's Petition should be addressed on the merits, a Reply is appropriate.

The District respectfully requests permission to file the reply attached hereto as Exhibit A in order to give the Authority the benefit of a full and complete discussion of the matters raised by On-Site in its Objection.

Respectfully submitted this 21st day of April, 2004.



Mark Jendrek, #12993
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P.O. Box 549
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865/824-1900
Attorney for East Sevier County Utility District




Charles B. Welch, Jr., #21747
FARRIS, MATTHEWS, BRANAN,
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618 Church Street, Suite 300
Nashville, Tennessee 37219
615/726-1200
Attorneys for East Sevier County Utility District

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served upon the following persons by hand delivery or by United States Mail, with proper postage thereon.

Donald L. Scholes
Branstetter, Kilgore, Stranch & Jennings
227 Second Avenue North, 4th Floor
Nashville, Tennessee 37201-1631

This 21st day of April, 2004.



Mark Jendrek

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: PETITION OF ON-SITE SYSTEMS, INC.)
TO AMEND ITS CERTIFICATE OF) Docket No. 03-00329
CONVENIENCE AND NECESSITY)

**REPLY TO THE OBJECTION OF ON-SITE SYSTEMS, INC.
TO PETITION FOR RECONSIDERATION ,
INTERVENTION, AND/OR FOR A DECLARATORY ORDER
OF EAST SEVIER COUNTY UTILITY DISTRICT**

Comes now East Sevier County Utility District ("District"), by and through counsel, and in reply to the Objection filed by On-Site Systems, Inc. ("On-Site") to the District's Petition for Reconsideration, Intervention, and/or for a Declaratory Order ("Petition for Reconsideration"), states as follows:

I. **By the Express Language of the Tennessee Code and the Tennessee Rules & Regulations, the District Is a Party to this Docket, and Should Have Been Joined as One.**

While it is correct to assert that the District was not a participant in the proceedings to date under Docket No. 03-00329, such an assertion does not preclude the District from being a "party" by operation of the definitional provisions of the Tennessee Code ("Code") and Tennessee Rules & Regulations ("Rules & Regs"). At this point, particularly given the fact that the District was entitled to receive notice of On-Site's petition, and that the District meets both the statutory

definition of "party" as well as the definition set forth in Section 1220-1-2-.01(2)(b) of the Rules & Regs, the District is a party, and is entitled to file a Petition for Reconsideration.

For purposes of this matter, a "party" is defined in several ways. The Code defines party as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." Tenn. Code Ann. §4-5-102(8) (emphasis added). Notwithstanding the Tennessee Regulatory Authority ("Authority") staff's attempts to assure that the District received notice of On-Site's petition (discussed in the Petition for Reconsideration), and notwithstanding the misleading reply of On-Site to the staff's inquiry, the District nevertheless is "properly seeking and entitled as of right to be admitted" to this proceeding as party, and therefore satisfies the definition of "party" for purposes of Section 4-5-102(8) of the Code.

As detailed in the District's Petition for Reconsideration, the District is now, and intends to continue, providing services in the area sought to be added to On-Site's Certificate of Convenience and Necessity ("CCN"). On-Site had full knowledge of this, and nevertheless avoided giving required notice to the District; even after prompting by the Authority staff. On-Site cannot create a scenario in which it intentionally omits notice to the District and then plead the District's lack of participation as a bar to the Petition for Reconsideration. Because the District is

"entitled as of right to be admitted as a party," it is a "party" for purposes of this proceeding, and is entitled to file the Petition for Reconsideration.

The Rules & Regs provide that "'party' means any person having a right, under the provisions of the laws applicable to the Authority, to appear and be heard in a contested case and includes . . . persons who are given leave by the Authority to intervene in a contested case in accordance with applicable law and these rules." Tenn. Rules & Regs §1220-1-2-.01(2)(b). There can be no doubt that were the District to have received notice of this proceeding, the District would have been "given leave by the Authority to intervene." It is clear that there can be no doubt because such leave to intervene was granted the District in Docket No. 04-00045 under even less egregious circumstances. Additionally, as a person whose rights may be directly affected by the order in Docket No. 03-00329, the District satisfies the definitional provision of "any person having a right under provisions of the laws applicable to the Authority to appear and be heard."

To the extent the action by the Authority in the Order entered on March 24, 2004, in Docket No. 03-00329 carries a component of exclusivity, the District's right to provide service to customers requesting such service in Sevier County is directly effected by that order. To take from the District that right to provide service without notice and a hearing is not proper, particularly when the lack of notice was the result of On-Site's less than candid response to the Authority staff's inquiry.

"Parties" is also defined later in the Code. "All persons having a right under the provisions of the laws applicable to the Authority to appear and be heard in contested cases as defined in this chapter shall be deemed parties to such proceedings for the purposes of this chapter." Tenn. Code Ann. §65-2-107. Because the District has a right under the provisions of the laws applicable to the Authority to appear and be heard in this Docket, the District "shall be deemed" a party to such proceeding. That the District did not participate at an earlier stage in these proceedings as a result of lack of notice cannot change the District's legal status as a party. Therefore, the District has the requisite standing to petition the Authority for a reconsideration of its Order entered in Docket No. 03-00329.

Finally, that same Code provision states: "in addition, the Authority may upon motion allow any interested persons to intervene and become a party to any contested case." Tenn. Code Ann. §65-2-107. Therefore, the Authority has the discretion under Section 65-2-107 to allow the District to become a party to this case. The District suggests that it would be an abuse of this discretion to deny the District status as a "party" for purposes of the Petition for Reconsideration given that the Authority attempted to assure notice to the District, and that On-Site elected not to comply.

Simply because the District was not joined as a participant in the proceeding does not mean that the District is not a "party" for statutory and rule or regulation

purposes. To hold otherwise would be to find that the Authority's Order has no bearing or effect on the District. The fact that On-Site intentionally avoided giving the District notice cannot change the legal status of the District under the statutory, and other, provisions regarding the definition of status as a "party."

II. Intervention Is Entirely Appropriate Pursuant to the Provisions of the Tennessee Code.

Again, the lack of notice to the District, combined with the Authority's obvious concern that notice be given, overrides any procedural technicality regarding time for filing a petition to intervene. After all, how could the District file a petition to intervene without notice of the proceeding itself?

Additionally, Section 65-2-107 of the Code contains no time element with respect to intervention and simply states that "the Authority may upon motion allow any interested person to intervene and become a party." Tenn. Code Ann. §65-2-107. Therefore, intervention is entirely appropriate, and in fact is necessary to prevent harm to the general public as more fully described in the District's Petition for Reconsideration.

III. The District Has Proper Standing to Request a Declaratory Order under Both the Tennessee Code and Tennessee Rules & Regulations.

On-Site's rationale for opposing the District's alternative relief regarding a request for a Declaratory Order—"because the District has never sought to have the area the Company requested in its Petition in this docket included within the

District's boundaries"—is specious and irrelevant. The criteria for standing to request a Declaratory Order is nothing more than status as "any interested person." Tenn. Code Ann. §65-2-104. As detailed in its petition, the District is far more than "any interested person." The District is actively providing and intends to continue providing wastewater services within the area attempting to be claimed by On-Site as its exclusive territory.

Not only is the District an "interested person" but the District currently has rights to provide service in the geographic area claimed by On-Site, which rights will be "taken" by this Authority to the extent the claims of On-Site as to exclusivity are upheld. To try to assert that when a property right currently held by the District is being taken away, the District has no standing to ask for a Declaratory Order is ludicrous. Notice and a hearing are fundamental Due Process rights which cannot be abrogated.

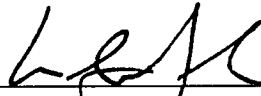
The mere fact that the District has not sought to make the area its exclusive service territory does not negate the District's status as an interested party, and therefore a party entitled to seek a Declaratory Order. The line of reasoning set forth in On-Site's Objection, "While the District may have the power to provide service outside of its boundaries, the District should not be permitted to object to the grant of the certificate to the Company by this Authority when the District has never sought to include such area within its own boundaries" is to say that no one

should be permitted to object to the grant of a CCN absent an attempt by that same entity to have the area declared its exclusive territory. There is absolutely no statute, rule, or regulation which would provide a basis for such an assertion.

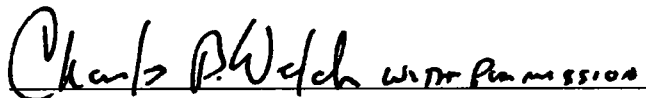
It is interesting to note that On-Site does not cite a relevant section of the Uniform Administrative Procedures Act in its objection to the District's request for a Declaratory Order. The Code specifically states that "any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule, or order within the primary jurisdiction of the agency." Tenn. Code Ann. §4-5-223(a). "Any affected person" carries no qualifier with respect to previous filings or requests for exclusive service territory. The sole criteria is that the person be affected by the action of the agency. Therefore, because the District is affected by the Authority's action in this Docket, the District is entitled to seek a Declaratory Order with respect to the order entered by the Authority on March 24, 2004.

WHEREFORE, the District respectfully requests its Petition for Reconsideration be granted, that the District be allowed to intervene, but that no action be taken other than granting the Petition for Reconsideration and Intervention, and that a ruling on the District's Request for Declaratory Order be stayed pending the outcome of the hearing in Docket No. 04-00045, which is specifically construing the exclusivity issue at the heart of this entire matter.

Respectfully submitted this 21st day of April, 2004.



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This 21st day of April, 2004.



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